



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WINKLEVOSS CAPITAL FUND, LLC,

Plaintiff,

-v-

CHARLES SHREM

Defendant.
-----x

18-cv-8250 (JSR)

MEMORANDUM

JED S. RAKOFF, U.S.D.J.

On November 8, 2018, the Court issued a bottom-line order denying plaintiff's motion to confirm the order of attachment. Dkt. 52. The reasons for this decision are set forth below.

Under Fed. R. Civ. P. 64, the remedy of attachment is governed by the law of the state in which the court is located. In New York, CPLR § 6212 governs the issuance of orders of attachment, requiring that plaintiffs establish the following by affidavit or other written evidence: (1) that there is a cause of action; (2) that it is probable that the plaintiff will succeed on the merits; (3) that one or more grounds for attachment provided in CPLR § 6201 exist; and (4) that the amount demanded from the defendant exceeds all counterclaims known to the plaintiff. See N.Y. C.P.L.R. § 6212(a); see also Bank of China, N.Y. Branch v. NBM L.L.C., 192 F. Supp. 2d 183, 186 (S.D.N.Y. 2002) ("plaintiff bears the burden of establishing

the grounds for attachment"). Attachment is considered "a drastic remedy that may unfairly prejudice defendants," and, for that reason, "New York attachment statutes are construed strictly against those who seek to invoke the remedy." Plaintiff Funding Holding, Inc. v. Carrera, No. 17-cv-257, 2017 WL 7411183, at *2 (E.D.N.Y. Feb. 6, 2017).¹ "[S]atisfaction of the statutory criteria for issuing an order of attachment is not a guarantee that the court will issue such a relief." TAGC Mgmt., LLC v. Lehman, 842 F. Supp. 2d 575, 586 (S.D.N.Y. 2012); see also Katz Agency, Inc. v. Evening News Ass'n, 514 F. Supp. 423, 429 (S.D.N.Y. 1981) ("In any event, a plaintiff is never entitled to an attachment as a matter of right."). The decision to confirm an order of attachment always remains discretionary with the Court, and New York law instructs that it "be used sparingly." Katz Agency, 514 F. Supp. at 429; see also Musket Corp. v. PDVSA Petroleo, S.A., 512 F. Supp. 2d 155, 160 (S.D.N.Y. 2007) ("Such relief is discretionary, and since attachment is a harsh remedy, the court must exercise care in its application.").

With respect to the third statutory criteria - that one or more grounds for attachment provided in CPLR § 6201 exist - plaintiff claims that it meets the grounds set forth in CPLR §

¹Unless otherwise indicated, case quotations omit all internal quotation marks, alterations, footnotes, and citations.

6201(1) and/or § 6201(3). See Ex Parte Application for Prejudgment Attachment ("Pl. App."), Dkt. 24; Motion to Confirm Attachment Order, Dkt. 31 (referring the Court to Pl. App. for plaintiff's arguments as to why attachment is proper). However, plaintiff has failed to meet its burden to establish that either of these grounds for attachment applies.

Section 6201(3) provides for attachment where "the defendant, with the intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts." N.Y. C.P.L.R. § 6201(3). "In seeking an attachment pursuant to § 6201(3), fraudulent intent must be proven, not simply alleged or inferred in the moving papers," although it may be proven circumstantially "by proof of certain objective facts - badges of fraud - that give rise to an inference of intent to defraud." Nat'l Audubon Soc'y, Inc. v. Sonopia Corp., No. 09-cv-975, 2009 U.S. Dist. LEXIS 17094, at *12-*14 (S.D.N.Y. Mar. 6, 2009).

In this regard, plaintiff especially relies on the argument that defendant's failure to pay in full the forfeiture he owes the Government, pursuant to his plea agreement in a prior criminal case, demonstrates an intent to evade creditors. Pl. App. at 12. However, until last week, the Government had failed

to ask the Court to set any schedule for these payments, which defendant had in fact begun making.² Defendant's failure to make payments that were not yet scheduled does not evince an intent to evade creditors.

Plaintiff also argues, based on its allegations in the complaint, that defendant has demonstrated an intent to evade creditors based on defendant's alleged failure to account for all of plaintiff's funds. Pl. App. at 11. However, as plaintiff acknowledges, "having meritorious causes of action is not in and of itself sufficient to support prejudgment attachment." Reply in Support of Motion to Confirm Attachment Order ("Pl. Reply"), Dkt. 49, at 6.³ And none of the other conduct that plaintiff

² The schedule has now been set and approved by the Court. See United States v. Shrem, 14-cr-243, Dkt. 88.

³ Plaintiff argues that their allegations "closely parallel" those in two New York state cases where attachment was found appropriate. Both are distinguishable. Mineola Ford Sales Ltd v. Rapp, 242 A.D.2d 371 (N.Y. App. Div. 1997) found attachment warranted where plaintiff had "produced sufficient evidentiary facts" showing that defendant, plaintiff's employee, had diverted plaintiff funds to pay her credit card companies and purchase jewelry and other personal items. Arzu v. Arzu, 190 A.D.2d 87, 91-92 (N.Y. App. Div. 1993) found attachment warranted where the defendant, acting as a fiduciary for his son, the plaintiff, had admitted that he used plaintiff's funds in furtherance of his own business interests without providing plaintiff any shares in the business. In this case, plaintiff has made no comparable showing at this point in the litigation. Plaintiff substantially relies in this regard on the movement of 5,000 bitcoin into defendant's account. But defendant has produced considerable evidence tending to show that this transfer is innocent and unrelated to plaintiff's case. See Affidavit of Charlie Shrem in Support of Opposition to Motion to

cites as "badges of fraud" satisfies plaintiff's burden of establishing fraudulent intent. Plaintiff's imputations that fraudulent activity and intent explain defendant's financial success following his release from prison, his decision to move to Florida, and his decision to continue investing in cryptocurrency (as he has always done) are, at most, "allegations raising a suspicion of intent to defraud." Morin v. Trupin, 738 F. Supp. 98, 105 (S.D.N.Y. 1990) (emphasis added). Such allegations fall short of the showing required to establish fraudulent intent sufficient for attachment. See id. (allegations raising only a suspicion are "not enough"); Plaintiff Funding, 2017 WL 7411183, at *5 ("courts issuing orders of prejudgment attachment on the basis of CPLR § 6201(3) usually rely on a plethora of evidence of fraudulent intent") (emphasis added). Accordingly, plaintiff has failed to satisfy § 6203(3).

Plaintiff similarly fails to make the requisite showing under § 6201(1). Section 6201(1) provides that ground for attachment exists when "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state." CPLR § 6201(1). It is "designed to serve two independent purposes: obtaining

jurisdiction over and securing judgments against nondomiciliaries residing without the state.” ITC Entm’t, Ltd. v. Nelson Film Partners, 714 F.2d 217, 220 (2d Cir. 1983). However, where, as here, jurisdiction has already been established and attachment is sought only as a security, “attachment should issue only upon a showing that drastic action is required for security purposes.” Buy This, Inc. v. MCI Worldcom Comms., Inc., 178 F. Supp. 2d 380, 383 (S.D.N.Y. 2001) (emphasis in original). Plaintiff must make “an additional showing that something, whether it is a defendant’s financial position or past and present conduct, poses a real risk of the enforcement of a future judgment.” Bank of China, 192 F. Supp. at 188.

Plaintiff has not alleged that defendant lacks sufficient assets to satisfy a judgment. To the contrary, plaintiff argues that defendant has experienced a “sudden increase in his personal fortune” directly attributable to his retention of plaintiff’s funds. Pl. App. at 12. Plaintiff instead argues that defendant’s assets “are largely beyond grasp,” as they are in cryptocurrency investments or in a primary residence in Florida, which may be judgment-proof (although, as plaintiff acknowledges, there are exceptions to this rule). Pl. Reply at 4. To the degree that this is an attempt to argue that defendant lacks sufficient assets, it fails. Stating the fact that

defendant invests some of his assets in cryptocurrency (which does not make them judgment-proof) or that he owns a home in Florida does not constitute a showing that he lacks sufficient assets. As discussed during oral argument on this motion, defendant has additional assets in real estate investments and conventional bank accounts. See November 8, 2018, Hearing Transcript.

Plaintiff otherwise falls back on the argument that defendant "is likely to hide or dispose of" assets to evade judgment. Pl. Reply at 4. But, as plaintiff concedes, this argument likely "stands or falls" with their arguments under § 6201(3). Pl. App. at 11. Here, the argument falls. Defendant's choice to continue his longstanding investment in cryptocurrency is not in itself evidence of an intent to hide funds, and, for the reasons discussed above, plaintiff's other attempts to raise suspicions of fraudulent intent fail to meet the high bar of plaintiff's required showing.

As plaintiff has failed to meet its burden to show grounds for attachment under CPR § 6201, plaintiff's motion for attachment is denied.

SO ORDERED

Dated: New York, NY
November 15, 2018


JED S. RAKOFF, U.S.D.J.